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(iii) At least one other acquiring person has annual net sales or total assets of \$10 million or more; or

(2)(i) The acquiring person has annual net sales or total assets of \$10 million or more;

(ii) The joint venture or other corporation will have total assets of \$100 million or more; and

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million or more.

(c) For purposes of paragraph (b) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

(d) The commerce criterion of section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.

Example: Persons "A," "B," and "C" agree to create new corporation N, a joint venture. "A," "B," and "C" will each hold one third of the shares of N. "A" has more than \$100 million in annual net sales. "B" has more than \$10 million in total assets but less than \$100 million in annual net sales and total assets. Both "C"'s total assets and its annual net sales are less than \$10 million. "A," "B," and "C" are each engaged in commerce. "A," "B," and "C" have agreed to make an aggregate initial contribution to the new entity of \$6 million in assets and each to make additional contributions of \$6 million in each of the next three years. Under paragraph (c), the assets of the new corporation are \$60 million. Under paragraph (b), only "A" must file notification. Note that "A" also meets the criterion of section 7A(a)(3) since it will be acquiring one third of the voting securities

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of the new entity for \$20 million. N need not file notification; see § 802.41.

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§ 801.90 Transactions or devices for avoidance.

Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction.

Examples: 1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of \$30 million in the joint venture; persons "A" and "B" each have total assets in excess of \$100 million. Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, A1, which issues half of its authorized shares to A. Assume that A1 has total assets of \$1,000. "A" then sells 50 percent of its A1 stock to "B" for \$500. Thereafter, "A" and "B" each contribute \$15 million to A1 in exchange for the remaining authorized A1 stock (one-fourth each to "A" and "B"). A's creation of A1 was exempt under § 802.30; its sale of A1 stock to "B" was exempt under § 802.20; and the second acquisition of stock in A1 by "A" and "B" was exempt under § 802.30 and sections 7A(c) (3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by "A" and "B" having over \$10 million in assets. Such a transaction would be covered by § 801.40 and "A" and "B" must file notification and observe the waiting period.

2. Suppose "A" wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than \$10 million. The aggregate fair market value of the assets of the twenty store corporations is \$60 million. "A" proposes to sell the stores to "B" for \$60 million. For various reasons it is decided that "B" will buy the stock of each of the store corporations from "A". Instead of filing notification and observing the waiting period as contemplated by the act, "A" and "B" enter into a series of five stock purchase-sale agreements for \$12 million each. Under the terms of each contract the stock of four stores will pass from "A" to "B". The five agreements are to be consummated on five successive days. Because, after each of these transactions, the store corporations are no longer part of the acquired person (§ 801.13(a)

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does not apply because control has passed, see § 801.2), and because § 802.20(b) exempts the acquisition of control of each of the store corporations, none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five separate contracts is to avoid the requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

PART 802—EXEMPTION RULES

Sec.

- 802.1 Acquisitions of goods and realty in the ordinary course of business.
- 802.2 Certain acquisitions of real property assets.
- 802.3 Acquisitions of carbon-based mineral reserves.
- 802.4 Acquisitions of voting securities of issuers holding certain assets the direct acquisition of which is exempt.
- 802.5 Acquisitions of investment rental property assets.
- 802.6 Federal agency approval.
- 802.8 Certain supervisory acquisitions.
- 802.9 Acquisition solely for the purpose of investment.
- 802.10 Stock dividends and splits.
- 802.20 Minimum dollar value.
- 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold.
- 802.23 Amended or renewed tender offers.
- 802.30 Intraperson transactions.
- 802.31 Acquisitions of convertible voting securities.
- 802.35 Acquisitions by employee trusts.
- 802.40 Exempt formation of joint venture or other corporations.
- 802.41 Joint venture or other corporations at time of formation.
- 802.42 Partial exemption for acquisitions in connection with the formation of certain joint ventures or other corporations.
- 802.50 Acquisitions of foreign assets or of voting securities of a foreign issuer by United States persons.
- 802.51 Acquisitions by foreign persons.
- 802.52 Acquisitions by or from foreign governmental corporations.
- 802.53 Certain foreign banking transactions.
- 802.60 Acquisitions by securities underwriters.
- 802.63 Certain acquisitions by creditors and insurers.
- 802.64 Acquisitions of voting securities by certain institutional investors.
- 802.70 Acquisitions subject to order.

802.71 Acquisitions by gift, intestate succession or devise, or by irrevocable trust.

AUTHORITY: Sec. 7A(d), Clayton Act, 15 U.S.C. 18A(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

SOURCE: 43 FR 33544, July 31, 1978, unless otherwise noted.

§ 802.1 Acquisitions of goods and realty in the ordinary course of business.

Pursuant to section 7A(c)(1), acquisitions of goods and realty transferred in the ordinary course of business are exempt from the notification requirements of the act. This section identifies certain acquisitions of goods that are exempt as transfers in the ordinary course of business. This section also identifies certain acquisitions of goods and realty that are not in the ordinary course of business and, therefore, do not qualify for the exemption.

(a) *Operating unit.* An acquisition of all or substantially all the assets of an operating unit is not an acquisition in the ordinary course of business. *Operating unit* means assets that are operated by the acquired person as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity.

(b) *New goods.* An acquisition of new goods is in the ordinary course of business, except when the goods are acquired as part of an acquisition described in paragraph (a) of this section.

(c) *Current supplies.* An acquisition of current supplies is in the ordinary course of business, except when acquired as part of an acquisition described in paragraph (a) of this section. The term "current supplies" includes the following kinds of new or used assets:

(1) Goods acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person (e.g., inventory).

(2) Goods acquired for consumption in the acquiring person's business (e.g., office supplies, maintenance supplies or electricity), and

(3) Goods acquired to be incorporated in the final product (e.g., raw materials and components).